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IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, AND IVA ROGERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* TOWN OF LENOX, NEW YORK; TOWN OF STOCKBRIDGE, NEW YORK; AND TOWN OF SOUTHAMPTON, NEW YORK IN SUPPORT OF PETITIONER CITY OF SHERRILL, NEW YORK

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QUESTIONS PRESENTED

Amici will address the following three questions, all of which are fairly subsumed under the third question presented for review in the City of Sherrill's petition for a writ of *certiorari*:

1. Whether this Court's decisions in *Oneida I* and *Oneida II* resolved the issues of present-day title and sovereignty within the Oneida's 18th-century New York reservation.

2. Whether the Oneida's 18th-century New York reservation was either disestablished or, at the very least, substantially diminished as the lawful and intended result of the Treaty of Buffalo Creek of January 15, 1838, 7 Stat. 550.

3. Whether, in the eight generations following the 1838 Treaty of Buffalo Creek, the Oneida have lost their remaining title and sovereignty over most if not all of their original 18th-century reservation, regardless of whether such losses were contemporaneously authorized under federal law.

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INTEREST OF THE *AMICI CURIAE*[1]

"When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem v. Bartlett*, 465 U.S. 463, 471 n.12 (1984). The first two *amici* are towns within the area encompassed by the historic boundaries of the Oneida's 18th-century reservation – boundaries that have been treated as having been extinguished since at least the Jacksonian era.[2] These *amici* and other area local governments have struggled in recent years to carry out their responsibilities in the face of unilateral attempts by the Oneida Indian Nation of New York to withdraw increasing amounts of purchased land from state and local taxation, zoning, and other regulatory oversight – all on the premise that the 18th-century reservation boundaries have never been diminished to *any* extent and that the entire area is now and always has been "Indian country." The other *amicus* is a town located outside the boundaries of the Oneida land claim area, but which is keenly interested in the rules of present-day sovereignty and jurisdiction that apply in areas subject to ancient tribal claims.[3]

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[1] This *amici* brief is presented pursuant to this Court's Rule 37.4; the towns' authorized law officers appear as co-counsel. Pursuant to this Court's Rule 37.6, counsel of record for the *amici* represents that he authored this brief and that no entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The towns do intend in the future, however, to seek contributions from other towns in the Oneida land claim area to offset some of the expenses incurred in preparing and submitting this brief.

[2] The Town of Lenox, located in Madison County, was founded in 1809 and had a population of 8,665 as of the 2000 census. The Town of Stockbridge, also located in Madison County, was founded in 1836 and had a population of 2,080 as of the 2000 census.

[3] The Town of Southampton, located in Suffolk County on Long Island, was founded in 1640 and had a population of 54,712 as of the

The Oneida's unilateral attempts to withdraw lands from the local tax base have had a serious impact on the *amici's* budgets and services in recent years.[4] In addition, as this Court has recognized, creating "Indian country" sovereignty in "scattered checkerboard fashion over a territory otherwise under state jurisdiction" will "obviously" result in "many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory." *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 429 n.3 (1975). This is particularly so where, as here, the layout of the checkerboard is left entirely to the discretion of the Nation; sovereignty, jurisdiction, and regulatory authority over any given parcel of land supposedly change hands simply through an open-market transaction. This has resulted in the Nation being able to cherry pick whatever lands it wishes – including gas stations, convenience stores, shopping centers, marinas, and other key commercial properties – and then unilaterally purporting to declare their immunity from state and local taxation and regulation. It is difficult if not impossible for local governments to carry out their home rule powers and statutory mandates in the midst of the ensuing chaos and uncertainty.

2000 census. The Town's borders include lands held by the Shinnecock Indian Nation, which is not a federally recognized tribe. *See New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

[4] Although the Oneida Indian Nation makes "goodwill" grants to affected local governments, these are entirely voluntary, may be withheld at any time at the Nation's sole discretion, and in any event are insufficient to make up for the true lost tax revenues. For example, earlier this year the Nation withheld its annual $120,000 grant to the Stockbridge Valley Central School District because the District declined to fire an employee that the Nation wished to have terminated; the District took the position that a fund donor may not influence personnel matters in this manner. The District is now in fiscal chaos.

SUMMARY OF THE ARGUMENT

As Senior Judge McCurn emphasized in his pathmarking opinion on claims against private landowners in the Oneida land claim area, "the real task at hand" is to determine "how, in the 21st century, to reconcile the Indians' interest in their homelands with those of current landowners who, understandably, also view the claim area as their 'homeland.'" *Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61, 93 (N.D.N.Y. 2000). It has been eight generations since the United States and the Oneida entered into the Treaty of Buffalo Creek of January 15, 1838, 7 Stat. 550. To treat the Oneida's *entire* 18th-century reservation as having escaped the effects of the 1838 removal treaty and as still being "Indian country" today is to pretend that the events of the last two centuries did not occur. It ignores the purpose and effect of Indian removal – the official law of the land for much of the 19th century. It ignores the language and clear Congressional purposes behind the 1838 treaty. It ignores the facts that about 85% of the Oneida people *did* leave New York during the removal era, that only about 5% of the Oneida people live there today, and that the current population of the area embraced by the old reservation boundaries is over 99% non-Oneida.[5] And it

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[5] There were 600 Oneida in Wisconsin and 620 in New York at the time of the 1838 treaty, the Wisconsin Oneida having removed from New York beginning in the early 1820s. *See* Schedule A to the treaty, 7 Stat. at 556. The number of Oneida remaining in New York dwindled to 178 by the early 1840s. *See* Jack Campisi, *The Oneida Treaty Period, 1783-1838, in The Oneida Indian Experience: Two Perspectives* 61 (J. Campisi & L. Hauptman eds., 1988). The numbers are even more lopsided today; less than 5% of the Oneida people live in New York. *See* Barry M. Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples* 443 (2000) (as of the early 1990s there were 11,000 Oneida in Wisconsin, 4,600 in Ontario, and about 700 in New York). On the origin, execution, and legacies of the Oneida removal, see generally *The Oneida Indian Journey: From New York to Wisconsin, 1784-1860* (L. Hauptman & L. McLester eds., 1999).

ignores the last 166 years of "jurisdictional history," in which the federal government has *consistently* until recent years recognized state and local sovereignty over the lands in issue, with the exception of the dwindling number of tribal allotments that remained in trust.[6]

Indian nations, no less than other sovereigns, are subject to the rule that "[l]ong acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary." *Massachusetts v. New York*, 271 U.S. 65, 95 (1926). Pretending that reservation boundaries that were drawn in the 1780s are *still* in effect today without any adjustment – unfair and tragic though the intervening centuries have been in so many respects – would be like pretending that England never lost the colonies, that the Dutch never lost New York to the English, or that France and Spain have rights today on the North American continent.

Respecting long-established patterns of sovereignty, jurisdiction, and regulatory authority does not leave the Oneida without a means of either recovering for any treaty violations they are able to demonstrate in the ongoing land claim litigation or establishing sovereignty over recently purchased lands. As Senior Judge McCurn held on remand from this Court's decision in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) ["*Oneida II*"], the Oneida are entitled to recover historically adjusted monetary damages for any treaty violations they are able to establish (subject to various pending defenses and counterclaims that are presently being litigated).[7] The

[6] The land base of the Oneidas who elected not to remove dwindled to less than a thousand acres by the early 1840s, to 350 acres by the 1890s, and to 32 acres by the early 20th century. *See* Campisi, *supra* note 5, at 61.

[7] *See* 199 F.R.D. at 90-95. Now that the United States has intervened in the land claim litigation and sued the State of New York, *see id.* at 68-69, there is a proper forum to adjudicate the degree of the federal government's culpability for the events in issue, and to establish (through counterclaims for setoff and recoupment) the amount of the relative financial responsibility of the United States for the Oneida's losses, which can then be presented to Congress.

Oneida may use any monetary recovery to purchase additional lands, and may seek to make some or all of those lands exempt from state and local taxation by following the trust acquisition procedures spelled out in 25 U.S.C. § 465 and its implementing regulations, which ensure a judicially reviewable decision by the Secretary of the Interior that gives careful consideration to the concerns of all affected stakeholders, including "[j]urisdictional problems," "potential conflicts of land use," "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(e)-(g).

There is no reason why the § 465 trust acquisition mechanism could not be included as part of any final resolution of the underlying land claim (whether through settlement or a judicial decree). The Oneida have offered no explanation why it would be futile or impracticable to use this available remedial mechanism. Particularly in light of the eight generations of delay since the 1838 treaty and the reliance interests of the many other stakeholders in the land claim area, there is no good reason to recognize the Oneida's unilateral attempts to exercise self-help remedies in the midst of ongoing litigation in which the underlying merits have yet to be resolved. If the Oneida's sovereign landbase is to be rebuilt, it must be pursuant to the intergovernmental planning mechanisms created under 25 U.S.C. § 465, not through unilateral declarations of sovereignty over checkerboard acquisitions that are cherry-picked off the open market.

ARGUMENT

I. The Issues Of Present-Day Indian Title And Sovereignty Were Not Resolved In *Oneida I* And *Oneida II*.

The Oneida and the federal government will argue that the issues of current Indian title and sovereignty throughout the original reservation have already been resolved – either expressly or by necessary implication – in *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974) ["*Oneida I*"], and *Oneida II*. That argument misses the mark in at least two fundamental respects.

A. Most Of The Land Claim Area Involves Acquisitions That Have Not Yet Been Addressed By The Courts, And That Were Approved Both Expressly And Implicitly By The Federal Government During The Removal Era.

The original 18th-century Oneida reservation was acquired by the State and private parties through a series of some thirty transactions that extended through *eleven* Presidencies – from the second Washington Administration (1795) through the Polk Administration (1846).[8] This Court's opinions in *Oneida I* and *Oneida II* involved only the first of these transactions, in which the Washington Administration objected to New York's acquisition in 1795 of part of the reservation from the Oneida. *See* 470 U.S. at 232-33. The Oneida and the federal government would have this Court conclude that the resolution in *Oneida I* and *Oneida II* with respect to a "test case" involving fewer than 900 acres of the 1795 acquisition – a case decided on a

[8] The transactions are summarized in Findings of Fact (FOF) ¶¶ 6-28 in *Oneida Nation of New York v. United States*, 26 Ind. Cl. Comm. 138, 150-62 (1971), *aff'd in part and remanded in part*, 477 F.2d 939 (Ct. Cl. 1973).

limited set of affirmative defenses – dictates the outcome as to all other acquisitions that followed over the next 51 years and somehow forecloses other affirmative defenses that have never been addressed.

But as this Court observed just last Term, "the Government's Indian policies ... fluctuate[d] dramatically as the needs of the Nation and those of the tribes changed over time," often with "tragic consequences." *United States v. Lara*, 124 S. Ct. 1628, 1634 (2004). This case demonstrates the point. As the Indian Claims Commission found 26 years ago after an exhaustive analysis, the Washington Administration's objection in 1795 "was the last time that the Federal Government would make even a pretense of interfer[ing] with New York State's attempts to negotiate treaties for land cessions with any of the New York Indians, and certainly with the Oneida Indians." *Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 385 (1978); *see id.* at 395. Instead, beginning in the early 1800s and extending into the 1970s, it was the position of the Executive Branch that the Indian Trade and Intercourse Act was "not applicable to cases ... in which the State of New York [was] purchasing or condemning land from its own resident Indians." 26 Ind. Cl. Comm. at 146 (quoting U.S. position).[9] As the ICC summarized the historical record,

[9] *See also* July 1, 1968 Letter from Assistant Secretary of the Interior Harry R. Anderson to Jacob Thompson, *reprinted in* George C. Shattuck, *The Oneida Land Claims: A Legal History* 115-16 (1991) (reiterating long-standing position of the Department of Justice and Department of the Interior that the Trade and Intercourse Act did *not* apply "to the dealings of the State of New York with its Indians"); *Tuscarora Nation of Indians v. Power Auth.*, 257 F.2d 885, 889 (CA2 1958) ("[A] large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians.") *vacated as moot*, 362 U.S. 608 (1960).

New York's ongoing acquisition of Oneida reservation lands during the removal era was undertaken with the full knowledge and enthusiastic approval of the federal government:

> "Far from an on-going struggle for suprem[a]cy between the Federal Government and the State of New York as to the jurisdiction over New York's Indians ..., responsible official[s] of the Federal Government actually expressed the opinion that New York had the paramount rights to control the affairs of the Indians within its borders. ... [The historical] record indicates that the Federal Government was fully aware of New York's negotiations with the New York Indians at all times. The record also indicates that the United States had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job, i.e., buying lands from the New York Indians in order to persuade them to move west. The Federal Government's removal policy applied not just to New York State, but to the entire Atlantic seaboard. In New York State the state was carrying out [that] policy with very little Government help and that evidently was much to the liking of the Federal Government. ... *In carrying out its general removal policy the Government required cessions to itself of lands in Georgia from the Indians in that state, but it had no need to do so in New York State, because New York was doing it for them*." 43 Ind. Cl. Comm. at 405-06 (emphasis added, paragraph breaks omitted).[10]

[10] In at least two instances (1798 and 1802), the United States expressly approved the acquisitions. *See, e.g.*, 470 U.S. at 246-47 & nn. 19-20; 43 Ind. Cl. Comm. at 387. Thereafter, the approval was implicit; responsible federal officials participated in the events surrounding the acquisitions, were kept advised of developments, and facilitated the Oneida's removal, without ever objecting to New York's negotiation or execution of the land acquisitions. As the ICC summarized, with the exception of a single 1819 memorandum, "[n]o more was heard of the Indian Trade and Intercourse Act in the correspondence, memorials and other official documents relative to the sale of New York Indian lands to the State of New York and the removal of the Indians to the west[.]" 43 Ind. Cl. Comm. at 395; *see also id.* at 392-95; *id.* at 423-39 (FOF ¶¶ 47-49), 441-44 (FOF ¶ 51), and 446-63 (FOF ¶¶ 54-56).

As the ICC further held after examining the pertinent records, the 1838 Treaty of Buffalo Creek was negotiated on the basis of this shared understanding – that the Oneida should deal directly with New York, without federal supervision, in disposing of their remaining lands:

> "It is apparent that the negotiators for the Federal Government ... felt that political jurisdiction over the tribes and the real fee in the land belonged to the State of New York and was not in the Federal Government. With respect to the Oneida Indians who were partly in Madison County and partly in Oneida County, one of the Treaty Commissioners, Federal Indian Agent Gillet, advised the Commissioner of Indian Affairs that the fee title to the land was in the State of New York and therefore the Oneidas would have to make a treaty with the Governor of New York State relinquishing their interest in those lands." *Id.* at 403-04; *see also id.* at 460-61 (FOF ¶ 56).

The United States has previously conceded, and the ICC has specifically held, that the 1838 treaty authorized New York to acquire the Oneida's remaining reservation lands in direct transactions with the dwindling remnants of the tribe. *See id.* at 385, 406-07, 466.

This history is important in two critical respects. *First*, it belies the Oneida's claim that the entire 18th-century reservation was illegally conveyed between 1795 and 1846. The judicial determinations that have thus far been made concerning a single transaction that occurred during the Washington Administration do not establish the illegality of

later conveyances during the Jefferson, Madison, Monroe, Adams, Jackson, Van Buren, Harrison, Tyler, or Polk Administrations – especially where the State of New York was simply carrying out a cooperative policy with the active blessing of many of those Administrations pursuant to a shared understanding of the governing law. *Second*, this history must be given substantial weight in determining the extent of appropriate rights and remedies in the 21st century for allegedly illegal acquisitions of tribal lands that occurred during the 18th and 19th centuries. As this Court has emphasized, federal acquiescence in a State's assumption of jurisdiction not only is relevant in construing the underlying treaty or statute in issue, but "has created justifiable expectations" that deserve independent respect and protection. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 (1977); *see* Part III *infra*.

B. *Oneida I* And *Oneida II* Held Only That There Was A Justiciable Cause Of Action For Ancient Wrongdoing, And Did Not Resolve Issues Of Present-Day Rights And Remedies.

Both the majority and the dissent in *Oneida II* remarked upon "the extraordinary passage of time" in the land claim litigation. 470 U.S. at 256 (Stevens, J., dissenting); *see also id.* at 253 ("One would have thought that claims dating back for more than a century and a half would have been barred long ago."). The majority, however, held that the Oneida had a justiciable cause of action for the 1795 conveyance and also rejected certain affirmative defenses that the counties had raised (while holding open other potential defenses). *See id.* at 233-50.[11] The majority did *not* hold that the Oneida have

[11] For example, the majority expressly reserved judgment on the equitable defense of laches, *see* 470 U.S. at 244-45, as well as other "equitable" limitations on any final relief, *id.* at 253 n.27. In addition, although the majority rejected the argument that subsequent federal

continuing title and sovereignty over the disputed lands, and it expressly reserved all questions of remedy in any future proceedings "should Congress not exercise its authority to resolve these far-reaching Indian claims." *Id.* at 253 n.27.

Regrettably, Congress has not in the two decades since *Oneida II* come close to resolving these long-standing claims. Instead, after years of inaction, the federal government in 1998 joined the three Oneida tribes in seeking to add claims for trespass, ejectment, and monetary damages against a defendant class of 20,000 landowners in the land claim area. This litigation tactic was a shocking departure from long-standing assurances by both the federal government and the Oneida, and was rejected in a significant opinion by Senior Judge McCurn in September 2000. Note in particular Judge McCurn's blistering analysis of the federal government's "extremely detrimental" role in this litigation in the years since *Oneida II*.[12] With respect to the scope of this Court's prior decisions, Judge McCurn emphasized that "there is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right – a distinction which in the court's opinion must be drawn, especially given that the alleged wrong in this case occurred more than 200 years ago." 199 F.R.D. at 90 (emphasis in original); *see id.* at 66.

treaties in 1798 and 1802 had retroactively "ratified" the 1795 conveyance, *id.* at 246-48, no defenses were litigated involving the *prospective* effects of the 1838 Treaty of Buffalo Creek and the removal of over 85% of the Oneida from New York between 1820 and 1845. The United States recognized in *Oneida II* that numerous "additional considerations not raised by petitioners might bar recovery or limit relief in other cases" – including the 1838 treaty. Brief for United States As *Amicus Curiae* in Nos. 83-1065 and 83-1240, at 28; *see id.* at 28-40.

[12] 199 F.R.D. at 87; *see also id.* at 68-69 (criticizing the federal government's "inexplicable delay" in the land claim litigation and its "head-in-the-sand attitude"); *id.* at 71 n.9 (*re* "cavalier attitude" by federal government that "has pervaded this litigation and settlement efforts"); *id.* at 85-87.

Judge McCurn held that the Oneida could recover historically adjusted monetary damages for their dispossession, but could not seek to eject or recover damages from present landowners. *See id.* at 87-95. He relied heavily on this Court's "impossibility" cases in holding that the Oneida may not seek ejectment as a remedy for ancient wrongs:

> "These practical concerns as to the impossibility of restoring Indians to lands formerly occupied by them resonate deeply with this court. Such concerns are magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries – significantly longer than in [other cases in which the Supreme Court found the requested relief to be time-barred]. ... [T]he time has come to transcend the theoretical. The present motions cry out for a pragmatic approach." *Id.* at 92.

As set forth below, *amici* believe this same kind of pragmatic, equitable approach is required in resolving the Oneida's present claims to continuing sovereignty over lands from which they removed early in our Nation's history. Put another way, although the time-based concerns discussed by the dissent in *Oneida II* may not have been sufficient to extinguish the entire tribal cause of action, it is perfectly appropriate to give them substantial weight in deciding whether and to what extent the Oneida still have rights in the disputed lands and, if so, how those rights are best vindicated in the least disruptive manner with the greatest respect for the rights of *all* affected stakeholders. The Second Circuit in this case dismissed the relevance of the "impossibility" doctrine, restricting it to issues of possession and title, not sovereignty. *See* 337 F.3d 139, 156-58 (CA2 2003). This gives far too little weight to the importance of sovereignty over land; if anything, long-standing patterns of sovereignty, jurisdiction, and regulatory authority should be subject to *greater* certainty and repose than matters of title and use rights in land. *See* Part III *infra*.

II. The Original 18th-Century Oneida Reservation Was Either Disestablished Or, At The Very Least, Substantially Diminished Pursuant To The 1838 Treaty Of Buffalo Creek.

Amici fully agree with the City of Sherrill and other *amici* that the Oneida reservation in New York was either entirely disestablished or, at the very least, substantially diminished as the lawful and intended result of the 1838 Treaty of Buffalo Creek. This treaty was the New York manifestation of the federal government's "removal" policy – "the dominant feature of U.S. Indian policy" in the years between the War of 1812 and the Mexican War.[13] The removal policy was unfair to the tribes and was premised on unacceptable notions about the impossibility of Indians and non-Indians living together, but the changes wrought by the treaties and statutes from that era must be recognized and given effect unless and until overturned by Congress and the President. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) (although the "guiding philosophy" of

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[13] Robert M. Utley, *The Indian Frontier of the American West, 1846-1890*, at 37 (1984) ("Throughout the 1830s and 1840s the eastern Indians were uprooted and moved westward. Some fifty thousand people made the trek, many at great cost in suffering, hardship, and impoverishment. They yielded 100 million acres of eastern homeland in return for 32 million western acres and 68 million dollars in annuity pledges."). For additional works discussing the origins and execution of the federal removal policy, see, *e.g.*, Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* 189-207 (1981); Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 179-314 (1984); Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 156-207 (1994); Michael P. Rogin, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* (1975); Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (1975); Anthony F.C. Wallace, *Jefferson and the Indians: The Tragic Fate of the First Americans* (1999); Philip Weeks, *Farewell, My Nation: The American Indian and the United States, 1820-1890*, at 1-71 (1990).

the allotment era has been "repudiated," "we must give effect" to laws from that time).[14]

Without repeating arguments in other briefs, *amici* call the Court's attention to several broader flaws in the Oneida's 1838 treaty analysis:[15]

(a) The Oneida argued below, and the Second Circuit accepted, that a reservation may not be found to have been disestablished or diminished unless the treaty or other law included particular real estate language of immediate cession or restoration. *See* 337 F.3d at 161, 163. This argument relies entirely on cases involving allotment-era land conveyances, where the federal government had an interest (the right of preemption) to which precise language of real estate cession was relevant, and seeks to read the context of those cases back onto Indian claims within the 13 original States, where the federal government did not hold the right of preemption and therefore real estate language of cession in a treaty would be irrelevant. If anything, the language used in the 1838 treaty communicates much more powerfully than any title language a disestablishment of tribal sovereignty in Central New York State. If relatively dry real estate

[14] *See also United States v. Choctaw Nation*, 179 U.S. 494, 532-38, 541 (1900); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 463 (CA7 1998) (Harlington Wood, J., concurring) (courts cannot "renegotiate or rewrite the treaty or history, nor can we erase other relevant factors from the slate in order to satisfy this present generation") (*re* effect of Midwestern removal treaties), *cert. denied*, 526 U.S. 1066 (1999).

[15] The Oneida argued below that the 1838 treaty is void and unenforceable. But the President, the Senate, and this Court have always treated Buffalo Creek as a valid treaty, and the Oneida themselves collected money from the United States on the premise that the treaty *is* binding and enforceable. *See generally United States v. New York Indians*, 173 U.S. 464, 469-70 (1899); *New York Indians v. United States*, 170 U.S. 1, 5 n.1 (1898) (*re* ratification and proclamation of 1838 treaty); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857); Prucha, *American Indian Treaties*, *supra* note 13, at 203-07.

language during the allotment era was "precisely suited" to terminating Indian sovereignty, *DeCoteau*, 420 U.S. at 445, so much more the case for treaty language in which a tribe agreed to "remove" to the western "Indian Territory" and to establish its new "home," "government," and "laws" out there. Arts. 2, 4, & 13, 7 Stat. at 551-52, 554.

Moreover, even the cases involving allotment-era conveyances have emphasized that there is no "clear statement" rule regarding termination of tribal sovereignty; "we have never required any particular form of words before finding diminishment." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). The issue, instead, is whether there is a federal intent with respect to the affected lands that is "*inconsistent with the continuation of reservation status*." *Id.* at 414 (emphasis added). As this Court said more recently in *Yankton*, 522 U.S. at 345-46, the issue is whether the disputed language can be "reconciled" with the continued existence of the original reservation boundaries, or whether there is a "glaring inconsistency" between the new law and the old reservation.[16]

Here there is a "glaring inconsistency" – an "irreconcilable conflict" – between the Treaty of Canandaigua of November 11, 1794, 7 Stat. 44, and the 1838 Treaty of Buffalo Creek. The earlier treaty had "acknowledge[d]" the Oneida's large state-created reservation. Art. 2, 7 Stat. at 45. The 1838 treaty, on the other hand, said that the Oneida's "permanent" reservation

[16] *See also Rosebud*, 430 U.S. at 587 & n.4 (issue is whether there is a "congressionally manifested intent" that "reservation status" not survive; there are no "absolutes" in determining whether federal action resulted in a disestablishment of tribal jurisdiction); *DeCoteau*, 420 U.S. at 446 (Court looks for language indicating that the lands have been "stripped of reservation status"); *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420 (CA10) ("Cession language ... need not be the only language clearly signaling the cancellation of reservation boundaries."), *cert. denied*, 498 U.S. 1012 (1990).

would be out west, that they had to establish their own form of "government" and own "laws" out there, and they had to leave New York *"as soon as"* – not "if" – they could make "satisfactory arrangements." Arts. 2, 4 & 13, 7 Stat. at 551-52, 554 (emphasis added). Even giving a generous construction to the August 9, 1838 "solemn[] assur[ance]" by Agent Ransom H. Gillet, the Oneida agreed in 1838 that they either had to leave the eastern United States or that they would remain on *"their lands where they reside"* and could "if they choose to do so remain *where they are* forever." Joint Appendix [JA] 146 (emphasis added). These agreements necessarily operated to release and extinguish any claims of tribal sovereignty over New York lands on which the Oneida did *not* reside as of 1838. The contrary construction is simply unimaginable given the context and tenor of the times. To conclude that the sweeping terms of the 1838 removal treaty could somehow be read as a reaffirmation of the reservation boundaries drawn fifty years earlier in the 1788 state treaty – a result that would lead to the very jurisdictional and cultural conflict and chaos that the removal policies were intended to eliminate – is to disregard Congress's core purposes. "[A]s Mr. Justice Holmes ... commented, we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud*, 430 U.S. at 597 (quoting *Johnson v. United States*, 163 F. 30, 32 (CA1 1908)).[17]

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[17] *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist."); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' ... clearly runs counter to a tribe's later claims"); *DeCoteau*, 420 U.S. at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent."); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947) ("we cannot, under the guise of interpretation, ... rewrite congressional acts so as to make them mean something they obviously were not intended to mean"); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) (in construing a treaty, "[w]e stop short of varying its terms to meet alleged injustices").

(b) The Second Circuit took, in essence, an "all-or-nothing" approach to the 18th-century reservation boundaries: Because the Oneida were not physically compelled to remove from their home area, and because small remnants of the Oneida remained in New York on much-reduced holdings, the Second Circuit declined to find that the original reservation boundaries had shrunk *at all*. *See* 337 F.3d at 161-64. This reasoning ignores that the Oneida *did* agree to "remove" west, that the vast majority *did* leave New York during the removal era, that they *did* sell most of their remaining holdings pursuant to Article 13 of the 1838 treaty, that the remaining Oneida did *not* seek to occupy or control any part of their original reservation *other than* the small land holdings they retained, and that *over 99%* of the people living within the supposed "reservation" are non-Oneida. *See supra* note 5. This Court has repeatedly held that, even where a reservation may not have been entirely disestablished, it was at the very least substantially diminished as a result of the federal laws under scrutiny. *See, e.g., Yankton, supra*; *Hagen, supra*; *Rosebud, supra*. However one characterizes the August 9, 1838 agreement between Agent Gillet and the Oneida, it clearly went no further than the "lands where they reside[d]" and "where they [were]" as of that time. Under any reasonable construction of the treaty, particularly in its historical context, the original reservation was at least diminished to that extent.[18]

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[18] The Second Circuit erred in its reliance on *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), in which this Court invalidated attempts by New York State to impose taxes on Seneca lands in 1840 through 1843. Article 10 of the 1838 Treaty of Buffalo Creek had given the Seneca a five-year grace period to remain in New York following the treaty's ratification, which postponed the removal obligation until 1845

(c) The Oneida argued below that, since most of the original reservation had already been conveyed away by the time of the 1838 treaty, the treaty could only have had an effect on those several thousand acres still in the Oneida's possession at that time. Even putting to one side that this argument fails to explain why the reservation was not diminished at least to the extent of the lands sold *pursuant* to the 1838 treaty,[19] the argument fails on several levels. The Oneida promised to remove to a new "home" in the "Indian territory," where they could practice their own "government" and "laws," and to leave New York State "as soon as they can make satisfactory arrangements." (Arts. 2, 4, & 13, 7 Stat. at 551-52, 554.) These provisions on their face have a much broader sweep than the 5,000 acres then being held by the Oneida in New York. The expressed purpose of the 1838 treaty was to remove the Oneida from the entire State of New York. It would be irrational in light of that purpose to give the treaty such a narrow construction and application.

(the treaty not having been proclaimed until 1840); the removal obligation was thereafter rescinded completely with respect to two of the Seneca reservations that were the targets of the state tax. This Court held that because "[t]he time for the surrender of the possession, according to [the Senecas'] consent given in the [1838] treaty, had not expired when these taxes were levied" in the early 1840s, "[t]he taxation of the lands was premature and illegal." *Id.* at 770. This case involves the very different issue of continued claims of tribal sovereignty long *after* any transitional periods had passed and *after* nearly all of the lands had been sold away and all but a few of the Oneida had removed from New York State, as promised in the treaty. Similarly, *United States v. Boylan* involved only the 32-acre parcel that was occupied by a remnant of the original tribe after the removal policy had been carried out; there is not a hint in that decision of any kind of retained tribal sovereignty over the entire original reservation. *See* 265 F. 165, 171-74 (CA2 1920), *error dismissed*, 257 U.S. 614 (1921).

[19] As noted above, the ICC has previously determined, and the federal government has previously conceded, that Article 13 constituted a federal "authorization" for the State to deal directly with the Oneida in acquiring the remainder of the reservation. *See supra* at 9.

This Court has specifically held that a federal law can extinguish reservation status not only over lands actually conveyed in that law, but over lands previously disposed of and to be disposed of in the future. In *DeCoteau*, for example, much of the Lake Traverse Reservation was allotted immediately following the Dawes Allotment Act, ch. 119, 24 Stat. 388 (1887), and the remainder was ceded back to the federal government through an 1891 act. This Court held that the entire reservation was terminated by the 1891 act, *including* the lands that had previously been allotted. 420 U.S. at 446-47. That is no different than what happened here.[20]

III. Whether Or Not The Conveyances Of Oneida Land And Sovereignty Were Contemporaneously Authorized Under Federal Law, They Were Confirmed Through Decades Of Federal Policy And Inaction. Any Reversion Of Sovereignty Must Now Be Undertaken Pursuant To The Remedial Provisions Of 25 U.S.C. § 465.

This Court has emphasized "the special need for certainty and predictability" when dealing with long-standing reliance-based expectations regarding title, boundaries, and use rights.[21] This "special need" is served through the

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[20] *See also Pittsburgh & Midway*, 909 F.2d at 1420-21 ("[t]he restoration of unallotted lands ... cancelled reservation boundaries" over previously allotted as well as restored lands); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028 (CA8 1999) (Congress in an 1894 cession act "intended to diminish the reservation by not only the ceded land, but also by the [previously allotted] land which it foresaw would pass into the hands of the white settlers and homesteaders" in the future once the trust restrictions had expired).

[21] *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. ... This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations ...."); *see*

overlapping doctrines of acquiescence, abandonment, extinguishment, impossibility, release, and relinquishment, as well as through long-established principles regarding "takings" of recognized Indian title by the United States. The Oneida and the federal government may seek to limit these doctrines to matters involving title and possession of land, as opposed to sovereignty over that land. That distinction is unconvincing for several reasons. *First*, the Second Circuit linked its sovereignty analysis to the continued, unbroken existence of the Oneida's "Indian title" in the disputed lands, reasoning that a given parcel of land reacquires sovereign immunity from state and local taxation when "fee title" is reunited with "Indian title." *See* 337 F.3d at 157-58. The doctrines discussed below, however, all demonstrate that Indian title has not survived the past two centuries, but has been extinguished and taken. There are no continuing rights in taken lands.

Second, Congress did not separate the concepts of Indian title and sovereignty until 1948, the year it enacted the definition of "Indian country" in 18 U.S.C. § 1151. Before then, the extinguishment of Indian title to a given parcel would have been understood as "also diminishing the Reservation's jurisdictional boundaries" to that extent. *Thompson v. County of Franklin*, 987 F. Supp. 111, 124 (N.D.N.Y. 1997); *see also Yankton Sioux Tribe v. Gaffey*, 188 F.3d at 1022.

Third, stable rules of sovereignty, jurisdiction, and regulatory authority are, if anything, even more important than stable property and use rights. This Court's cases recognize that the "justifiable expectations of the people living in the area" extend not only to matters of title and use,

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also Arizona v. California, 460 U.S. 605, 620 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open."); cases cited in notes 24-26 *infra*.

but to issues of self-government, community planning and control, effective law enforcement, and the minimization of unwieldy "checkerboard" jurisdiction. *Hagen*, 510 U.S. at 421.[22] If there should be a reconstruction of "Indian country" in Central New York State, it must be undertaken pursuant to the intergovernmental planning mechanisms promoted by § 465, not through unilateral cherry-picking and checkerboard acquisitions of prime real estate on the open market.

A. The Federal Government's Long-Standing Recognition Of State And Local Sovereignty Over Nearly All Of The Original Reservation Area Supports A Determination Of Disestablishment Or Diminishment.

This Court has noted that, on a "pragmatic level," it is sometimes necessary to "acknowledge[] that *de facto*, if not *de jure*, diminishment may have occurred" at some points in our history. *Solem*, 465 U.S. at 471; *see also Yankton*, 522 U.S. at 356. Although demographic evidence alone provides "the least compelling" justification for a finding of diminishment, *Yankton*, 522 U.S. at 356, such a finding is warranted where demographic evidence is coupled with a long-standing recognition by the federal government – the tribes' guardian – of the primacy of state and local

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[22] *See especially Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (opinion of Stevens, J.) ("Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually – or more often unilaterally – destructive."); *id.* at 458 (opinion of Blackmun, J.) (emphasizing that the "ability to engage in the systematic and coordinated utilization of land" is "the very essence of zoning authority," and that zoning "'may indeed be *the most essential function performed by local government*'") (emphasis added, citation omitted).

jurisdiction, sovereignty, and regulatory authority over the lands now in dispute. *Rosebud* is closely on point. There, an arguably ambiguous 1904 law was treated by federal and state officials as having diminished reservation jurisdiction. Writing 73 years later, in 1977, this Court concluded that

> "the single most salient fact [in the jurisdictional history] is the unquestioned actual assumption of state jurisdiction over the [challenged area]. Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the 'jurisdictional history.' The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, *not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.*" 430 U.S. at 603-05 (emphasis added, citations omitted).

See also Yankton, 522 U.S. at 357 (emphasizing "[t]he State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day"); *DeCoteau*, 420 U.S. at 442 ("state jurisdiction over the ceded (*i.e.*, unallotted) lands went virtually unquestioned [from the 1890s] until the 1960s").

The cited cases involved periods of federal acquiescence of less than a century. Here the federal government took the position for over a century and a half that New York had properly acquired the lands from the Oneida and had lawful sovereignty and jurisdiction over all but a handful of the Oneida's original lands. This extraordinary period of

acquiescence is relevant not only because of the light it sheds on the 1838 treaty's intended meaning, but because it has created "justifiable expectations" that must be honored and protected when seeking to remedy whatever historic wrongs were committed against the Oneida.

B. The Federal Government Participated In The Taking Of Both The Oneida's Lands And Their Sovereignty With Respect To Nearly All Of The Original Reservation. There Is No Continuing Tribal Sovereignty Over Taken Lands.

The case for disestablishment or diminishment of the Oneida's sovereignty is reinforced by decisions finding federal "takings" of reservation lands after a long period of federal acquiescence in the illegal loss of those lands. To be sure, it is well-settled that illegal dispositions of tribal lands could be cancelled even after many years when the lands were still being held by the original purchasers.[23] This Court's cases establish, however, that where tribal lands were sold in violation of federal law, the conveyances were allowed to stand for several generations, and the lands were settled and developed in reliance on this federal acquiescence, the lands were "taken" from the tribes. *United States v. Creek Nation*, 295 U.S. 103 (1935), is illustrative. Lands belonging to the Creek were allotted to another Indian tribe and conveyed to settlers in violation of numerous federal laws, "and the grantees have since been holding the

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[23] *See, e.g., Heckman v. United States*, 224 U.S. 413 (1912) (allotted trust lands that were illegally conveyed between 1904 and 1908 could be recovered from the grantees in an action commenced within several years of conveyances); *Boylan*, 265 F. 165 (declaring that 1905 mortgage foreclosure of tribal land and forced removal of Oneida Indians had been illegal in ejectment action brought by United States several years later); *see also United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (CA9 1976) (railway right-of-way declared illegal in action brought 90 years after it had first been obtained).

same adversely to the Creek tribe." *Id.* at 107. This Court acknowledged that

> "the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden .... Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. *On the contrary, it permitted the disposals to stand – not improbably because of the unhappy situation in which the other course would leave the allottees and settlers.* In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.
>
> *"We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."* *Id.* at 110-11 (emphasis added).

And once tribal lands had been thus "taken" by the United States, while there continues to be a sovereign obligation to pay damages there are no continuing tribal rights in the land. In *Confederated Salish & Kootenai Tribes v. United States*, for example, treaty-guaranteed reservation lands had been illegally conveyed to settlers, granted to railroads, and turned into national forests. 401 F.2d 785, 786 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969). Notwithstanding the tribes' protests, the federal government had allowed these actions to stand for over 60 years and had "uniformly" treated the lands as no longer belonging to the tribes. Rather than seek monetary relief, the tribes argued that the lands were still theirs and sought possession and an accounting of profits. *See id.* Invoking *Creek Nation*, the court rejected this theory: the government's actions had

> "effected a taking of the plaintiffs' land. The Government would not be allowed to escape paying compensation for the property .... *By the same token, the Indians cannot now claim that the lands have always remained theirs.*" *Id.* at 789 (emphasis added).

These takings cases are applications of what has sometimes been called the "impossibility" or "impracticability" doctrine – the principle that, where Indian lands have been conveyed in violation of federal law, the conveyances have been allowed to stand for a long time, and the lands have passed into the hands of "innumerable innocent purchasers," the "restor[ation of] the Indians to their former rights" in the lands will be deemed a judicially "impossible" remedy. *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926). In *Felix v. Patrick*, 145 U.S. 317 (1892), for example, lands that properly belonged to an Indian claimant were conveyed in violation of federal law. Over the course of the next thirty years, the lands became part of the City of Omaha and were "now intersected by streets, subdivided into blocks and lots," and filled with "buildings of a permanent character." *Id.* at 334. As this Court bluntly concluded in rejecting the beneficial owners' claims to the lands, "it needs no argument to show that the consequences of setting [the conveyances] aside would be disastrous ... and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation." *Id.* at 335. Although *amici* acknowledge that these cases are distinguishable on various grounds, similar concerns apply here. Because Indian title was taken through the course of many generations of federal policies and acquiescence, the Oneida "cannot claim that the lands have always remained

theirs." *Confederated Salish & Kootenai Tribes*, 401 F.2d at 789.[24]

C. Most Of The Oneida People Abandoned And Relinquished Any Interests In The New York Reservation, Which Resulted At The Very Least In A Proportionate Diminishment Of The Reservation.

This Court has emphasized that there is "no reason" why the doctrine of "acquiescence" should not apply to disputes involving tribal lands, and has analogized to this doctrine in examining issues of reservation diminishment.[25] Whether

[24] *See also Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983) ("[i]f in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties" who have acquired water rights in reliance on earlier decrees); *id.* at 145 (Brennan, J., concurring) (citizens have the right to "rely on specific promises made to their forebears two and three generations ago" by federal officials, but the injured tribe may seek a takings remedy); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 409 n.26 (1980); *United States v. Minnesota*, 270 U.S. 181, 215 (1926) (where reservation lands had been illegally acquired by the State half a century or more earlier, "the United States is entitled to a decree canceling the patents for such as have not been sold by the State and charging her with the value of such as she has sold" – a recognition that illegally acquired lands that were long ago sold into private ownership are no longer subject to Indian title); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1467 (CA10 1987) (injustices against tribes "would have to be recompensed through monetary awards" rather than through quiet title or ejectment actions).

[25] *See United States v. Stone*, 69 U.S. (2 Wall.) 525, 537 (1865) (*re* tribal acquiescence in boundary of Delaware Indian Reservation for "more than thirty years"); *see also Rosebud*, 430 U.S. at 605 & n.28. *See generally Oneida II*, 470 U.S. at 257 n.5 (Stevens, J., dissenting); *Massachusetts v. New York*, 271 U.S. at 95-96. This Court has found in recent Terms that periods of sovereign acquiescence that ran for 43 and 64 years were insufficient under the particular facts of those cases to establish the defense. *See Virginia v. Maryland*, 124 S. Ct. 598, 610-11 (2003) (relevant alleged prescriptive period was 1957-2000); *New Jersey v. New York*, 523 U.S. 767, 786-90 (1998) (alleged prescriptive period ran from 1890-1954). Here the prescriptive period ran from no later than the Van Buren Administration until the Clinton Administration.

analyzed under the rubric of "acquiescence" or related principles of "abandonment," "extinguishment," "release," or "relinquishment," the removal by most of the original Oneida Nation away from New York many generations ago, coupled with the long-standing acquiescence of the remaining tribal members and their federal guardians in the exercise of state and local sovereignty over nearly all of the original reservation, should be held to have resulted in the disestablishment of tribal sovereignty and jurisdiction over all lands not retained by the Oneida.

Williams v. Chicago, 242 U.S. 434 (1917), is illustrative. The Potawatomi held rights in what is now northeastern Illinois pursuant to the Treaty of Greenville of August 3, 1795, 7 Stat. 49, a treaty that guaranteed tribal occupancy rights in similar language to that used in the 1794 Treaty of Canandaigua (*compare* Art. 2 of the 1794 treaty *with* Art. 5 of the 1795 treaty). The Potawatomi sold the area to the United States in 1833; most of the tribe thereafter removed west of the Mississippi River, but the small "Pokagon Band" remained in the Midwest. The Pokagon brought suit in the early 20th century seeking to recover possession of lands that, they claimed, had never been included within the earlier conveyance. They contended that "[i]t is not enough that the complainants' ancestors had removed from the vicinity of the lands in question," and that "[t]heir removal without sale does not affect their title." 61 L. Ed. 414, 416 (argument of counsel).

This Court unanimously rejected the "removal without sale" argument. The right recognized in the 1795 Treaty of Greenville had been one of occupancy alone, not "fee-simple title." 242 U.S. at 437.

> "If in any view [the Potawatomi Nation] ever held possession of the property here in question, *we know*

> *historically that this was abandoned long ago*, and that for more than a half century it has not even pretended to occupy [the claimed area]. ... We think it entirely clear that [the 1795 treaty] did not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned, *all legal right or interest which both tribe and its members had in the territory came to an end*." *Id.* at 437-38 (emphasis added).

The 1794 Treaty of Canandaigua did nothing more than "acknowledge" a state-created right of tribal "use and enjoyment" and promise to respect that right "until [the Oneida] choose to sell the [lands] to the people of the United States, who have the right to purchase." Art. 2, 7 Stat. at 45. Even if this created a *federal* occupancy right, *Williams* demonstrates that such a right did not continue after a tribe had ceased to occupy the actual area in dispute. Just like the Pokagon Band in *Williams*, the Oneida "long ago" moved off all but a handful of the lands and "ha[ve] not even pretended to occupy" those lands in the generations since. This constituted an "abandonment" of rights in all lands on which they no longer lived.[26]

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[26] *See also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 357-58 (1941) ("acquiescence" by tribe in an arrangement in which members moved to a reduced reservation in exchange for not being removed from the area altogether "must be deemed to have been a relinquishment of tribal rights" in all other lands that were "notoriously claimed by others"; "it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved"); *Buttz v. Northern Pac. R.R. Co.*, 119 U.S. 55, 69-70 (1886) (treaty-recognized title to certain Sioux land in Dakota Territory had been extinguished in part through the creation and acceptance of an 1867 reservation: "The Indians had then retired to the reservations set apart for them by the treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned[.]"); *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (CA10) (when Osage "chose to go elsewhere," this constituted "a surrender and abandonment" of treaty-recognized title in their former reservation), *cert. denied*, 287 U.S. 656 (1932).

This line of cases – whether labeled "acquiescence," "abandonment," or something else – has two important consequences here. *First*, during the removal era, the Oneida fragmented into various factions, most of which accepted lands elsewhere in North America and removed entirely from New York. The Oneida who actually removed from New York clearly relinquished their New York claims under the cases discussed above, and the size of any remaining reservation must accordingly be diminished to reflect these removals.[27]

Second, these principles apply as well to the remnants of the Oneida community that chose to remain in New York. The Oneida's agreement with the federal government in 1838 was to remove west "as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida" – language that, they were told, would allow them to remain "where they *reside*" and "where they *are* forever," if "satisfactory arrangements" could not be made. *See* JA 146 (emphasis added). Even giving this language its most generous reasonable construction, the deal struck through the treaty negotiations was that the Oneida could remain "where they *are*" and "where they *reside*" (*i.e.*, on the 5,000 acres they still possessed in 1838), not that they could *reassert* rights in the

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[27] This proportionate reduction is not only fair and equitable on its own terms, but accords with American history. Under the 1887 Dawes Allotment Act and similar legislation of that era, reservations were "allotted" into separate parcels to be held individually, with a cap on acreage per individual, and with "surplus" lands then sold off. There is no reason to believe that the remnants of the Oneida that remained in New York would have escaped this per capita approach had they somehow managed to hang on to their original reservation lands until the late 19th century.

295,000 acres they had given up in recent generations. The Oneida who stayed in New York never thereafter sought to exercise possession or sovereignty over lands their forebears had previously conveyed. They thereby lost any remaining rights they may have held in these lands through acquiescence, abandonment, and relinquishment every bit as much as the Oneida who moved away from New York.

CONCLUSION

This Court should reverse the judgment below and hold that the Oneida's 18th-century reservation has been disestablished or, at the very least, substantially diminished. Any rebuilding of a sovereign Oneida landbase in Central New York State should be carried out pursuant to 25 U.S.C. § 465.

Respectfully submitted,

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